duty that the offender has fraudulently evaded or has attempted fraudulently to evade. Accordingly I allow this appeal and set aside the fines imposed by the magistrate.

Taking into consideration the total amount of duty evaded and the fact that the appellant has already sold the goods in respect of which he evaded the duty, and has thus illegally enriched himself, I consider that the appropriate fines should be determined by applying a multiplier of 10 to the amount of duty stated to have been evaded in the two charges to which he pleaded guilty.

I therefore substitute fines of $15,000 and $1,300 for those I have set aside and order that in default of payment the appellant serves terms of imprisonment of four months and one month respectively.

Appeal allowed.

Solicitors: *Sandhu & Co.*

A MALAYSIAN REPORTS

PUBLIC PROSECUTOR v. ORHAN OLMEZ

[S.C. (Salleh Abas L.P., Hashim Yeop A. Sani & Abdoolcader S.C.JJ.) March 3 & April 22, 1987]

B **[Kuala Lumpur – Supreme Court Criminal Application No. 3 of 1987]**

Public International Law – Diplomatic immunity – Diplomatic agent allowed to give evidence solely for authentication of legal documents in an extradition enquiry – Whether this constitutes waiver of immunity from jurisdiction – Diplomatic Privileges (Vienna Convention) Act, 1966.

C

Diplomatic Privileges – Immunity – Diplomat allowed to give evidence "solely for authentication of legal documents" – Whether constitutes waiver of immunity – Vienna Convention.

D

Criminal Procedure – Subpoena to diplomatic agent – Warrant of arrest – Inviolability of diplomatic agent – Vienna Convention, arts. 29 & 31(2)

In this case the First Secretary to the Embassy of Turkey gave evidence in court in an extradition proceeding in the Magistrate's Court in Kuala Lumpur. His attend-
E ance was preceded by a diplomatic note from his Embassy the gist of which was that he would be present during the hearing of the proceeding "in his capacity as consul" and "solely for the authentication of legal documents." It was made clear in the note that he would reply "only to questions pertaining to the authentication" and would refrain from answering any other questions. During the course of
F the cross-examination a question arose as to the correctness of the translation of certain documents sent by the Turkish Government. The hearing was adjourned apparently to enable the First Secretary to identify the translation with the right documents. However on the same day, the Turkish Embassy sent another diplomatic note to the Ministry of Foreign Affairs to say that the First Secretary will not be
G attending court any more. Counsel for the respondent applied to the court to issue a warrant of arrest to compel the attendance of the First Secretary. The learned Magistrate refused the application. Counsel then wrote to the High Court to apply for a revision of the ruling of the learned Magistrate. The learned Judge after hearing arguments in open court exercised his power of revision and ordered that a subpoena be issued for the attendance of the
H First Secretary. The learned Judge also ruled that in the event of his failure to attend court on the date specified in the subpoena a warrant of arrest would be issued against him. The Public Prosecutor applied to the Supreme Court to refer certain questions to the court, the main question being – "Whether or not the learned Judge was right in law to hold that the act of the sending state allowing the
I diplomatic agent to give evidence solely for authentication of the legal documents in an extradition enquiry constitutes a waiver of immunity from jurisdiction under Article 32 of the Schedule to the Diplomatic Privileges (Vienna Convention) Act, 1966."

Held: (1) a waiver under the Vienna Convention must always be express. The restrictive language in the first

diplomatic communication is clear and it cannot be construed as anything like a waiver of immunity;

(2) the learned Judge in this case fell into error when he construed the first diplomatic note as an express waiver of immunity from jurisdiction. The learned Judge's opinion that the conditions stipulated in the diplomatic note with regard to the giving of evidence by the diplomatic agent were contrary to the law and procedure in this country cannot be sustained in view of the Diplomatic Privileges (Vienna Convention) Act, 1966;

(3) because of his view that the first diplomatic note contained an express waiver the learned Judge fell into the second error when he ruled that the Turkish Embassy was not entitled to claim immunity for the diplomatic agent in the second diplomatic note;

(4) in no way would the act of giving evidence as indicated in the first diplomatic note constitute the submission of the diplomatic agent or make him subject to our jurisdiction or even render him obliged to give evidence or make him a compellable witness. Nothing short of his government abandoning him and stripping him off of diplomatic immunity would make him amenable to our jurisdiction.

Cases referred to:

(1) *Tungku Abubakar & Ors.* v. *Sultan of Johore* [1949] M.L.J. 187.
(2) *Tungku Abubakar & Ors.* v. *Sultan of Johore* [1950] M.L.J. 3, 20 C.A.
(3) *Tungku Abubakar & Ors.* v. *Sultan of Johore* [1952] M.L.J. 115; [1952] A.C. 318 P.C.

CRIMINAL REVISION.

Karpal Singh for the fugitive criminal.

John O'hara (*Miss Lee* with him) (Deputy Public Prosecutors) for the respondent.

Cur. Adv. Vult.

Zakaria Yatim J.: On the application of Mr. Karpal Singh, counsel for a fugitive criminal of a foreign country, in an extradition proceeding against the fugitive criminal in a Magistrate's Court under the Extradition Ordinance 1958, I agreed to exercise my power of revision under section 323 of the Criminal Procedure Code. The issue raised in Mr. Karpal Singh's application involves an important question of law relating to a foreign diplomat, who had given evidence in that proceeding but subsequently on the instructions of the Turkish Ministry of Foreign Affairs he did not attend court for the continued hearing. The facts leading to the hearing of this criminal revision are as follows:

On July 21, 1981 a requisition was made by the Republic of Turkey to extradite the fugitive criminal back to the Republic. On the same date, a special direction was given by the Minister of Home Affairs under section 3A of the Extradition Ordinance. The fugitive criminal was arrested on July 28, 1986 and extradition proceeding commenced in the Magistrate's Court, Kuala Lumpur on December 12, 1986. On December 20, 1986, the First Secretary to the Turkish Embassy in Kuala Lumpur, Mr. Tarik Yelvac, gave evidence at the request of the defence. The Deputy Public Prosecutor called him to testify at the proceeding and he attended court that day on the basis of a diplomatic note (P20) dated December 19, 1986. He completed the examination in chief and Mr. Karpal Singh had commenced his cross-examination. During his cross-examination on the documents sent by the Turkish Government, there was some confusion about the translation. The matter was adjourned to enable the witness to identify the translation with the right documents. On January 21, 1987, when the hearing resumed for Mr. Karpal Singh to continue with his cross-examination, Mr. Yelvac did not turn up in court. A document dated January 19, 1987 (P21) was produced by the Deputy Public Prosecutor. This document is another diplomatic note sent by the Turkish Embassy stating that Mr. Yelvac would not be appearing in court any more. As a result of this note and Mr. Yelvac's absence, Mr. Karpal Singh applied to the court to issue a warrant of arrest against Mr. Yelvac to compel him to appear in court. The Magistrate, after hearing the arguments of both sides, gave her ruling on January 22, 1987, that a warrant of arrest could not be issued by virtue of Article 29 as contained in the Schedule to the Diplomatic Privileges (Vienna Convention) Act, 1966 (hereinafter referred to as "Vienna Convention Act").

The question that this Court is asked to determine is whether the Magistrate was right in making the ruling that she could not issue a warrant of arrest by virtue of Article 29. This article, together with the other relevant articles of the Vienna Convention on Diplomatic Relations signed in 1961, are set out in the Schedule to the Vienna Convention Act and have the force of law in this country.

Article 29 which the Magistrate relied upon guarantees that the person of a diplomatic agent shall be inviolable. He is not liable to any form of arrest or detention. Article 1 defines a "diplomatic agent" as the head of the mission or a member of the diplomatic staff of the mission. Mr. Yelvac is clearly a diplomatic agent within the meaning of the definition, and as such he is entitled to the protection accorded by Article 29.

As a diplomatic agent he enjoys diplomatic immunity from the criminal jurisdiction of our Court. He also enjoys immunity from the Court's Civil and Administrative jurisdiction except in three specific cases mentioned in Article 31(1). Clause 2 of the same article provides that, as a diplomatic agent, Mr. Yelvac "is not obliged to give evidence as a witness" in our court of law or in any tribunal.

The immunity of a diplomatic agent from the jurisdiction of the court, including immunity from giving evidence as a witness, may, however, be waived by the sending state which, in the present case, is the Republic of Turkey. This is clearly provided in Article 32 as contained in the Schedule of the Vienna Convention Act. The waiver referred to in this Article must always be expressed. (See clause 2.)

Mr. Yelvac gave evidence in the Magistrate's Court on December 20, 1986 on the basis of a diplomatic note (P20). The note explicitly states in the following words:–

"Upon the instructions of the Turkish Ministry of Foreign Affairs, with the view to fulfilling the legal requirements of the Malaysian Authorities, *Mr. Tarik Yelvac will be present during the case hearing* of Mr. Orhan Olmez in his capacity as Consul of this Embassy *solely for authentication of the legal documents* prepared and sent by the Turkish Authorities as well as letters, notes and documents sent by this Embassy.

In this connection, during the hearing, *Mr. Yelvac will reply only to the questions pertaining to the Authentication of the aforementioned legal documents. Mr. Yelvac will refrain from replying any other questions posed by either the Honourable Magistrate or other persons.*

The Embassy of the Republic of Turkey would be grateful if the foregoing is transmitted to the relevant Malaysian Authorities before the hearing."

[Emphasis added]

It is clear that in this note the Republic of Turkey had expressly waived the immunity of Mr. Yelvac from the jurisdiction of the Court in this country in an express form. The waiver, includes a waiver from immunity not to give evidence as a witness in the extradition proceeding. The waiver is only confined to giving evidence on the authentication of the legal documents used in the extradition proceeding. In my opinion, such waiver is perfectly in order. But the note went on to stipulate conditions that Mr. Yelvac would refrain from replying any other questions posed by the Magistrate or other persons. By "other persons" I take it to include counsel for the fugitive criminal. In other words, Mr. Yelvac was not to be questioned by the Magistrate, and neither is he to be cross-examined by counsel for the fugitive criminal.

These conditions are contrary to law and procedure relating to an extradition proceeding in this country. Under section 9(1) of the Extradition Ordinance, in hearing the extradition proceeding, the Magistrate shall hear the case "in the same manner and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him accused of an offence committed within his jurisdiction and triable by the High Court." In hearing the extradition proceeding the Magistrate has to observe the rules of evidence as laid down in the Evidence Act, 1950. The Magistrate is entitled to put any question to the witness to clarify certain matters in his evidence. See section 425 of the Criminal Procedure Code. See also *Mallal's Criminal Procedure*, 4th Edition, p. 597. Under section 138(1) of the Evidence Act witnesses shall be first examined-in-chief, then, if the adverse party so desires, he may be cross-examined. Under the Evidence Act, both the Magistrate and the counsel for the fugitive criminal are entitled in law to question Mr. Yelvac, provided that the questions relate only to the authentication of the documents.

The conditions stipulated in the diplomatic note (P20), that Mr. Yelvac should refrain from replying any questions put by the Magistrate and counsel for the fugitive criminal, are contrary to our law especially the Extradition Ordinance and the Evidence Act. I accordingly rule that the conditions stipulated in the diplomatic note (P20) do not affect the law and procedure in the extradition proceeding and the Magistrate should ignore these conditions. These conditions are also contrary to the spirit of the Vienna Convention on Diplomatic Relations, 1961 to which the Republic of Turkey is a contracting party and also contrary to the rules of international law. A learned and eminent writer on international law, Dr. B. Sen, in his book, *A Diplomat's Handbook of International Law and Practice*, 2nd Edition, at page 126 states:

"It is of the essence especially in criminal trials that all witnesses are liable to be cross-examined by the opposite party or his lawyer, and this principle, which may be regarded as part of natural justice or fair trial, will be applicable equally to a diplomat who may decide to give evidence in any proceeding before the Courts, civil or criminal."

In a subsequent diplomatic note dated January 19, 1987 (P21), the Embassy of the Republic of Turkey in Kuala Lumpur stated in the following words:

"... upon the instructions of the Turkish Ministry of Foreign Affairs, *Mr. Tarikh Yelvac will not be appearing before the Court again,* in connection with the case hearing of Mr. Orhan Olmez which will be held between January 21-24, 1987.

Since Mr. Yelvac has already appeared in the court and given evidence as to the authentication of the legal documents prepared and sent by this Embassy, *the relevant Turkish authorities believe that the legal requirements of the Malaysian authorities have already been met.*

The Embassy also *believes that the evidence submitted would be sufficient for Mr. Orhan Olmez's extradition to Turkey."* [Emphasis added]

It is not expressly stated in the note that the Republic of Turkey, by stating that Mr. Yelvac would not be appearing before the Court again, was claiming immunity for Mr. Yelvac. But it is implicit from the note that the Republic is claiming immunity. If the Republic was claiming immunity for Mr. Yelvac that he should not appear before the Court again, in my opinion the Republic is not entitled to do so since there is already an express waiver. Dr. B. Sen, in his book *(supra)* at page 131 states that "... once such waiver is made, there would be no question of raising the plea of immunity in a later stage of the proceeding in the suit." In *Tungku Abubakar & Others* v. *Sultan of Johore,*[1] Gordon-Smith J. held that although the Sultan was sovereign, he had waived his immunity by instituting the proceedings in the Japanese Court. The originating summons before the learned judge was a continuation of the earlier proceedings in the Japanese Court and therefore should continue in view of the waiver. The Court of Appeal[2] confirmed the decision of Gordon-Smith J. In his judgment in the Court of Appeal Willian C.J. (F.M.) said:

"Accordingly I hold that the Sultan by instituting proceedings in the Japanese Court submitted to the jurisdiction of that Court, that by virtue of the Japanese Judgments and Civil Proceedings Ordinance, 1946, the proceedings brought by the Trustees in the High Court of the Colony of Singapore are a continuation of the proceedings instituted by the Sultan in the Japanese Court, and therefore the claim by the Sultan of immunity from the jurisdiction of the High Court of the Colony of Singapore fails."

The decision of the Court of Appeal was subsequently upheld by the Privy Council.[3]

With regard to the other part of the diplomatic note (P21), which states that the "evidence submitted would be sufficient for Mr. Orhan Olmez's extradition to Turkey," in my opinion it is the Magistrate who decides whether or not there is a *prima facie* case against the fugitive criminal. If the Magistrate finds that there is a *prima facie* case against him, then she commits him to prison pending his extradition to the Republic of Turkey. See section 10 of the Extradition Ordinance, 1985.

Since there is a waiver, Mr. Yelvac is obliged to attend the court and continue to give evidence as a witness in the extradition proceeding on the authentication of the documents. In view of the waiver, he is subject to the jurisdiction of the court to compel a witness to attend court. The Magistrate can issue a subpoena to compel Mr. Yelvac's attendance in court on a specified date. If he fails to comply with the subpoena, which is duly served on him, the Magistrate can issue a warrant of arrest against him. Mr. Yelvac is not protected by Article 29 of the Vienna Convention if such warrant of arrest is issued against him, in view of the waiver.

I accordingly order that a subpoena be issued under the provisions of the Criminal Procedure Code to compel Mr. Yelvac's attendance in court on a specified date. If he fails to attend court on the date specified in the subpoena, and the subpoena has been duly served on him, then a warrant of arrest will be issued against him. I should mention here that the subpoena should state that Mr. Yelvac is required to attend court for the purpose of giving evidence on the authentication of the documents only.

Order accordingly.

SUPREME COURT.

John O' Hara (Deputy Public Prosecutor) (*Lee Oi Kuan* (Deputy Public Prosecutor) with him) for the applicant.

Karpal Singh for the respondent.

Hashim Yeop A. Sani S.C.J. (delivering the Judgment of the Court): We gave leave to the Public Prosecutor to refer to us four questions under section 66 of the Courts of Judicature Act 1964 and then proceeded to hear the merits.

The four questions referred were as follows:

(1) Whether or not the learned Judge was right in

law to hold that the act of the sending State allowing the diplomatic agent concerned to give evidence solely for authentication of the legal documents in an etradition enquiry constitutes a waiver of immunity from jurisdiction under Article 32 of the Schedule to the Diplomatic Privileges (Vienna Convention) Act 1966.

(2) If the answer to question 1 is in the negative, whether such diplomatic agent who has commenced to give evidence in court willingly can in law at any time refuse to continue giving evidence and absent himself from attending court without permission of the court.

(3) If the answer to question 1 is in the affirmative, is it right in law for the learned Judge to hold that once a waiver of immunity from jurisdiction is given by a sending State, it cannot claim immunity at a later stage of the proceedings.

(4) In the circumstances of this case whether it is right in law for the learned Judge to order a subpoena be issued to the said diplomatic agent compelling him to attend court on a specified date and that if he failed to attend court on such date, a warrant of arrest be issued against him.

First some background facts. Some time in July 1986 the Embassy of the Republic of Turkey in Kuala Lumpur requested for the extradition of a Turkish national who had been convicted of the offence of murder and sentenced to life imprisonment by their court in Ankara.

On December 19, 1986, the extradition proceeding commenced in the Kuala Lumpur Magistrate's court and one Mr. Tarik Yalvac, the First Secretary to the Embassy of the Republic of Turkey, gave evidence in court. Mr. Yalvac came voluntarily to the court and no subpoena was issued for his attendance. His attendance, however, was preceded by a diplomatic note dated December 19, 1986, from his Embassy to the Ministry of Foreign Affairs (Exhibit P20). After Mr. Yalvac completed his examination-in-chief he was cross-examined by Mr. Karpal Singh who was counsel for the subject of the extradition proceeding. During the course of the cross-examination a question arose as to the correctness of the translation of certain documents sent by the Turkish Government. The hearing was adjourned apparently to enable Mr. Yalvac to identify the translation with the right documents. On the same day the Turkish Embassy sent another diplomatic note to the Ministry of Foreign Affairs stating that Mr. Yalvac would not be attending court any more. When the learned Magistrate next sat Mr. Karpal Singh applied to the court to issue a warrant of arrest to compel Mr. Yalvac's attendance. The learned Magistrate after hearing arguments held that a warrant of arrest could not be issued by virtue of Article 29 of the Vienna Convention.

Mr. Karpal Singh then wrote to the High Court to apply for a revision of the ruling of the learned Magistrate. The learned Judge after hearing arguments in open court on February 14, 1987, delivered judgment on February 19, 1987, whereupon he exercised his power of revision and ordered that a subpoena be issued for Mr. Yalvac's attendance in court on a specified date for the purpose of giving evidence on the authentication of the extradition documents. The learned Judge further ruled that in the event of Mr. Yalvac's failure to attend court on the date specified in the subpoena a warrant of arrest would be issued against him.

The Vienna Convention on Diplomatic Relations (1961) was ratified by Malaysia. Certain Articles of the Convention have been given effect and have the force of law in this country by virtue of the Diplomatic Privileges (Vienna Convention) Act 1966. These Articles can be found in the Schedule to the Act which was deemed to come into force on December 9, 1965.

Of the four questions referred to us only question No. 1 forms in our opinion the crux of the matter. The only issue is whether the first diplomatic note from the Turkish Embassy (Exhibit P20) constitutes a waiver of immunity from jurisdiction. If the answer to the question is in the negative then the remaining questions are of little consequence.

It is therefore important to look at the first diplomatic note and for convenience the same is reproduced below.

"The Embassy of the Republic of Turkey presents its compliments to the Ministry of Foreign Affairs and with reference to its Note No. 728-300 dated 18th December 1986, has the honour to inform the latter of the following:

Upon the instructions of the Turkish Ministry of Foreign Affairs, with a view to fulfilling the legal requirements of the Malaysian authorities, Mr. Tarik Yalvac will be present during the case hearing of Mr. Orhan Olmez in his capacity

as consul of this Embassy solely for authentication of the legal documents prepared and sent by the Turkish authorities as well as letters, notes and documents sent by this Embassy.

In this connection, during the hearing, Mr. Yalvac will reply only to the questions pertaining to the authentication of the aforementioned legal documents. Mr. Yalvac will refrain from replying any other questions posed by either the Honourable Magistrate or other persons.

The Embassy of the Republic of Turkey would be grateful if the foregoing is transmitted to the relevant Malaysian authorities before the hearing.

The Embassy of the Republic of Turkey avails itself of this opportunity to renew to the Ministry of Foreign Affairs the assurance of its highest consideration."

Note that the gist in this diplomatic communication is that Mr. Yalvac would be present during the hearing of the proceeding "in his capacity as consul" and "solely for authentication of the legal documents." Also note that it was made clear that Mr. Yalvac would reply "only to the questions pertaining to the authentication" and would "refrain from replying any other questions."

The second diplomatic note (Exhibit P21) also dated January 19, 1987 need not be reproduced here as the gist of the communication is only to inform the Ministry of Foreign Affairs that Mr. Yalvac would not be appearing in court any more.

The restrictive language in the first diplomatic communication is clear and it cannot be construed as anything like a waiver of immunity. It was merely to express the diplomatic agent's *willingness* to give evidence voluntarily although he is not by virtue of Article 31(2) of the Convention legally *obliged* to give evidence as a witness.

A waiver under the Convention must always be express – Article 32(2).

The inviolability of diplomatic envoys is universally accepted today. The theory and practice of International Law agree nowadays that the receiving States have no right, in any circumstances whatever, to prosecute and punish diplomatic envoys. For a diplomatic envoy must never be considered to be under the legal authority of the receiving State.

It is said that diplomatic envoys are sacrosanct and the principle of their inviolability is generally recognised. There is, however, one exception. If a diplomatic envoy commits an act of violence which disturbs the internal order of the receiving State in such a manner as makes it necessary to put him under restraint for the purpose of preventing recurrence of similar acts, or if the diplomatic envoy conspires against the receiving State and the conspiracy can be made harmless only by putting him under restraint, he may be arrested for the time being, although he must in due time be safely sent home. See also *Oppenheim* Vol. I Sixth Ed. s.387, 388.

This inviolability has been consecrated in Article 29 of the Convention. "Diplomatic agent" is defined in the Convention to mean the head of mission or a member of the diplomatic staff of the mission. Article 29 reads:

"The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

Franciszek Przetacznik's Protection of Officials of Foreign States According to International Law at page 9 discusses the definition of personal inviolability of officials of foreign States:

"It should be observed that the definition of the personal inviolability of officials of foreign States contained in the Vienna Conventions and the Convention on Special Missions calls for clarification especially with respect to its details. The formulation that such an official is not liable to 'any form of arrest or detention' might be construed as limiting the interdiction of the application of legal constraint only to 'arrest and detention,' while there exist still other measures of constraint which should not be applied with respect to foreign officials. Therefore, this principle should be formulated in a general way, so as to cover all measures of constraint. Moreover, the formulation that the receiving State 'shall take' all appropriate steps seems too weak."

The sum total of the meaning of the personal inviolability of officials of foreign States may be stated as follows: on the one hand, it means a guarantee of non-application of measures of legal constraint with respect to their persons, and on the other hand, it also imposes on the receiving State the special duty not only to refrain by its organs from any acts infringing upon their personal inviolability, but also to take all appropriate steps to protect them and prevent any attack on their persons, freedom and dignity.

The learned Judge in this case fell into error when he construed the first diplomatic note as an express waiver of immunity from jurisdiction of the court in this country. It was not. The learned Judge was also of the opinion that the conditions

stipulated in the diplomatic note with regard to the giving of evidence by Mr. Yalvac were contrary to the law and procedure in this country. This opinion cannot be sustained in view of the 1966 Act. Because of his view that the first diplomatic note contains an express waiver the learned Judge fell into the second error when he ruled that the Turkish Embassy was not entitled to claim immunity for Mr. Yalvac in the second diplomatic note.

Apart from the question of waiver, Mr. Karpal Singh argued – and his argument was accepted by the learned judge – that by giving evidence Mr. Yalvac had submitted himself to the jurisdiction of our court and as such he could no longer refuse to give further evidence with impunity. According to him, a warrant of arrest can therefore properly be issued to compel Mr. Yalvac to give evidence. In our view this contention is erroneous. Article 31(2) says "a diplomatic agent is not obliged to give evidence as a witness." This immunity belongs to his Government and not one which is personal to him. The power to waive the immunity and the extent of waiver is a matter for his State and so is the revocation of the waiver. When Mr. Yalvac turned up in court to give evidence on December 19, 1986, he did no more than comply with his government's wishes as indicated in the first diplomatic note directing him to give evidence in our court. In no way would his act of giving evidence constitute his submission or make him subject to our jurisdiction or even render him obliged to give evidence or make him a compellable witness. Nothing short of his government abandoning him and stripping him off of diplomatic immunity would make him amenable to our jurisdiction.

We therefore answered the first question (and the only real issue in this reference) in the negative. The order of the learned Judge was accordingly set aside.

Question answered.

Solicitors: *Karpal Singh & Co.*

PENGARAH INSTITUT PENYELIDIKAN PERUBATAN & ANOR. v. INTHRA DEVI & ANOR.

[S.C. (Mohamed Azmi, Hashim Yeop A. Sani & Wan Hamzah S.C. JJ.) May 21 & August 5, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 411 of 1986]

Tort – Negligence – Failure to provide safe and proper place of work – Breach of statutory duty – Damages – Quantum – Factories and Machineries Act, 1967.

Trade and Industry – Factories – Failure to provide safe and proper place of work – Breach of statutory duty – Factories and Machineries Act, 1967.

Damages (Personal Injury or Death) – Severe burns – Plastic surgery and psychiatric therapy – Husband of injured wife – Having to do household work and looking after children – Claim for general and special damages.

The first respondent, a dental surgery assistant, was injured when the door of an autoclave burst open throwing out surgical instruments and boiling water upon her resulting in her sustaining severe burns. It was alleged that the appellants were negligent in failing to provide a safe and proper place of work and in failing to take precautionary measures to prevent the accident. The respondents also alleged breach of statutory duty under the Factories and Machineries Act, 1967. The second respondent alleged that after the accident he had to do all the household work including looking after the two children. Both respondents claimed general and special damages. The learned Judge gave judgment for the respondents and awarded damages as follows –

(a) in respect of the first respondent

(i) $80,000 as general damages with interest at 8%.
(ii) $46,152 as cost of plastic surgery and $10,500 as cost of psychiatric therapy at a private clinic
(iii) $20,000 for loss of earning capacity
(iv) agreed special damages.

(b) in respect of the second respondent
(i) $10,000 as general damages
(ii) loss of 2 weeks' wages and payment to nephew to look after children.

The appellants appealed against the awards.

Held: (1) the appeal against the general damages in respect of the first respondent is dismissed. In the special circumstances of the case the award should not be disturbed, although it would appear to be a bit on the generous side;

(2) the awards in respect of plastic surgery and psychiatric therapy should be disallowed as the treatment is available in any government hospital and they should be regarded as absorbed in the award for general damages;

(3) there is no evidence that the first respondent would lose her job as a dental surgery assistant and therefore the award for loss of earning capacity should be quashed;